NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

SHIRLEY PHILLIPS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. No. 2000-072**
	)	
WATER BAY MANAGEMENT CORPORATION,	)	
	)	
Defendant.	)	
	)	

APPEARANCES:

Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
For the plaintiff,

James M. Derr, Esq.
St. Thomas, U.S.V.I.
For the defendant.

MEMORANDUM

Moore, J.

In this slip and fall action, Shirley Phillips ["Phillips" or "plaintiff"] alleges that she fell while walking down an outdoor stairway at the Point Pleasant Resort on St. Thomas, which is owned by defendant Water Bay Management Corporation ["Water Bay" or "defendant"]. According to the plaintiff, at the time she fell, the stairs were wet, had little tread, no handrails, and were blocked by a drooping palm frond. According to Rosie Mackay ["Mackay"], the plaintiff's proffered safety expert, the stairs suffer from the dangerous defect of uneven risers and treads, which in combination can cause a misstep like

the one here. Water Bay has moved to strike Mackay's expert report, and filed a motion for summary judgment on any remaining admissible evidence. On November 2, 2001, the Court held a *Daubert* hearing to determine the admissibility of Mackay's expert report under Rule 702 of the Federal Rules of Evidence. For the reasons stated below, the Court will grant in part and deny in part Water Bay's motion to strike Mackay's report, and deny Water Bay's motion for summary judgment.

Discussion

The Court will grant Water Bay's motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue respecting any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Sharpe v. West Indian Co.*, 118 F. Supp. 2d 646, 648 (D.V.I. 2000). The nonmoving party may not rest on mere allegations or denials, but must establish by specific facts that there is a genuine issue for trial from which a reasonable juror could find for the nonmovant. *See Saldana v. Kmart Corp.*, 42 V.I. 358, 360-61, 84 F. Supp. 2d 629, 631-32 (D.V.I. 1999), *aff'd in part and rev'd in part*, 260 F.3d 228 (3d Cir. 2001). Only evidence admissible at trial will be considered and the Court must draw all reasonable inferences therefrom in

favor of the nonmovant. *See id.*

Because Phillips does not claim that Water Bay had actual notice of the alleged dangerous condition of the stairs, Phillips must ultimately prove that Water Bay knew or should have known that the condition of the stairs created an unreasonable risk of harm to a business invitee such as herself. *See* RESTATEMENT (SECOND) OF TORTS § 343 ["Restatement"];[1] *see also Saldana v. Kmart*, 260 F.3d 228, 232 (3d Cir. 2001). To establish constructive notice of the dangerous condition, Phillips must be able to show that, "under all the circumstances, the defective condition of the [stairs] existed long enough so that it would have been discovered with the exercise of reasonable care." *Id.*

Although the parties have presented dueling evidence regarding the presence or absence of the drooping palm frond,[2]

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[1] Section 343 provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343.

[2] Water Bay further contends that, even if the palm frond had been drooping in front of the stairs, the dangerous condition caused by it was "open and obvious," thus relieving Water Bay of liability. *See* RESTATEMENT § 343A(1) ("A possessor of land is not liable to his invitees for physical harm caused to them by any . . . condition on the land whose danger is known or

the success of Water Bay's motion for summary judgment rises and falls on the admissibility of Mackay's expert opinion regarding the undisputedly uneven riser heights and tread surfaces of the steps. Water Bay asserts that Mackay's opinion does not fit the facts in evidence and is otherwise irrelevant.

Federal Rule of Evidence 702 imposes three major requirements for expert opinions: (1) the witness must be an expert; (2) the procedures and methods used must be reliable; and (3) the testimony must "fit" the factual dispute at issue so that it will assist the jury. *Saldana v. Kmart*, 260 F.3d at 232 (citing *Kumho Tire v. Carmichael,* 526 U.S. 137, 149-50 (1999); *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 590-93 (1993); *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). Even if the evidence offered by the expert witness satisfies Rule 702, it may still be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." FED. R. EVID. 403; *see Saldana*, 260 F.3d at 233. As always, the evidence must be relevant to be admissible. FED. R. EVID. 402. Finally, Rule 703 states that the "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the

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obvious to them . . . .").

hearing." Otherwise the jury will be offered ultimately irrelevant and potentially prejudicial or confusing evidence.

In her report, Mackay refers to OSHA standards (including those relating to the "coefficient of friction" and slip resistence for work surfaces), ADA standards, the Uniform Building Code, the National Fire Protection Association Life Safety Code, and sections from a slip and fall treatise addressing "muscle memory" and riser height. At the outset, any reference to OSHA standards or ADA standards is inadmissible as irrelevant and potentially confusing. *Saldana*, 260 F.3d at 233 (citing Restatement §§ 286 and 288 and affirming this Court's conclusion that OSHA standards (and any other standard intended to protect a class of persons to which the plaintiff does not belong) do not define the standard of care owed to a business invitee and would not assist the trier of fact).[3] Thus, any reference to the coefficient of friction information contained in the report would not be admissible at trial and will not be considered for purposes of this motion.

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[3] The plaintiff urges the Court to disregard the Court of Appeals' holding in *Saldana* that OSHA standards are irrelevant and confusing to determine the standard of care to business invitees in the Virgin Islands. She argues that, in distinguishing its application of a different standard in deciding a case under Pennsylvania law, the Court of Appeals ignored that Pennsylvania applies section 343 of the Restatement just as the Virgin Islands does. The plaintiff does not mention that the Court of Appeals in *Saldana* was applying section 288 of the Restatement to the Virgin Islands, as required by Virgin Islands law.

The defendant further disputes the applicability of the provision of the National Fire Protection Association Life Safety Code relied on by Mackay as support for her opinion, as well as the applicability of the Virgin Islands 1995 Uniform Building Code requirement for uniform riser heights to these stairs at Point Pleasant Resort, which were built over twenty years ago. *See* V.I. Code Ann. tit. 29, § 291(f) (adopting the 1994 Uniform Building Code as incorporated by reference in the Virgin Islands Building Code). Because the subject fire code provision has not been adopted in the Virgin Islands, Mackay's reference to it is not relevant and will not be considered here. The Court need not decide at this point, however, whether the Uniform Building Code's provision regarding riser height applies to these steps at Point Pleasant Resort because, as explained below, a key principle on which Mackay relies in support of her opinion that the condition of the stairs caused the accident is not only relevant and admissible, but also lends sufficient materiality to the plaintiff's claim to withstand Water Bay's motion for summary judgment.

According to Mackay, a person going down a series of steps unconsciously relies on the uniformity of the riser height after she has established a "muscle memory" from the height of the first riser. Enough of a variation in the riser height and a

"misstep" or fall may result. (*See* Mackay Report at 8 (attached as Ex. A. to Decl. of James M. Derr in Supp. Mot. Summ. J.).) To reach this opinion, Mackay relies on section 3.12 of the *Slip and Fall Handbook* by Stephen I. Rosen, J.D., PhD. As quoted by Mackay, the handbook describes the critical feature of riser height as it relates to stair accidents:

> If the riser is too high, it will cause the foot coming off it to land further out on the tread surface. Thus, a high riser can cause the ball of the foot to land where there is little or no tread to support it. A low riser will place the foot back so far that when the opposite foot attempts to clear the surface below, the heel will become caught in the tread surface. In both extremes, the so-called "misstep" will place the legs and upper body into a fall pattern.

(Emphasis added.) Section 314 of the same treatise discusses "muscle memory" and variations in riser heights:

> Another insult to the locomotor gait is variation between riser heights in stair systems; studies of human locomotion on stair systems and studies of actual stair accident scenes have indicated in the majority of stair accidents, stair systems have variations in riser heights.

Mackay's own measurements of the relevant portion of the stairs, which have not been disputed, indicate that on the left side of the stairs (where the alleged slip and fall occurred), the first riser going down the stairs is 5 1/4 inches in height, while the second riser is 6 3/4 inches high. The first tread surface extends 13 1/4 inches out, while the second tread surface extends out only 11 inches.

Mackay opines in her report that the dangerously uneven risers, along with the wet and uneven surface of the treads, the lack of handrails, and the drooping palm frond, contributed to, and together caused, the plaintiff's fall. (*See* Mackay Report at 10-12.) Upon careful questioning by the defendant's counsel at Mackay's deposition, however, Mackay stated unequivocally that the fall would have happened whether the stairs were wet or dry. (Mackay Dep. at 29.) Moreover, Mackay could only speculate that the presence of handrails would have assisted the plaintiff in regaining her balance. (*Id.* at 34.) Finally, Mackay states that "most likely" the accident would have occurred whether the palm frond was there or not, reiterating her opinion that the accident was "because of the difference in the risers." (Mackay Dep. at 33.)

The Court of Appeals has explained that an expert opinion cannot be speculative: "Situations in which the failure to qualify the opinion have resulted in exclusion are typically those in which the expert testimony is speculative, using such language as "possibility." *Schulz v. Celotex Corp.*, 942 F.2d 204, 208 (3d Cir. 1991) (discussing level of certainty required for expert medical opinions); *see also Holbrook v. Lykes Bros. S.S. Co. Inc.*, 80 F.3d 777, 784 (3d Cir. 1996) ("A determination that the expert has good grounds assures that the expert's

opinions are based on science rather than 'subjective belief or unsupported speculation.'")(quoting *Daubert*). In light of Mackay's testimony, then, the only part of her expert report that is based on much more than speculation and retains any potential relevance, and that would assist the jury, is that part of the opinion and report concerning the variation in the step risers.

In its motion to strike, the defendant does not question the validity of the "muscle memory" theory as explaining why people have accidents on steps with uneven risers. Instead, Water Bay asserts that the muscle memory theory does not "fit" the evidence and thus is not admissible. According to the defendant, the evidence establishes that Phillips fell as she was stepping down from the landing onto the *first* tread surface, meaning that no theoretical "muscle memory" misstep could have caused the accident. Viewing the evidence in the light most favorable to Phillips, and drawing all reasonable inferences, I conclude that Phillips's testimony does not necessarily preclude a finding that she fell while stepping down to the *second* tread surface, rendering Mackay's muscle memory opinion relevant and admissible.

According to Phillips' deposition testimony, she stepped from the landing by placing her right foot on the first tread surface. Her right foot landed far enough out on the tread that only three-quarters of her foot came in contact with the tread,

the rest going over the edge of the step. (*See* Phillips' Dep. at 31.) She then brought her left foot forward and was just shifting her weight from her right to her left foot when she "slipped" and fell. (*See id.*) Phillips also states that her left foot "just grazed the stair" right before she fell. Although it is not clear from the testimony which stair Phillips refers to, her counsel demonstrated at the *Daubert* hearing that Phillips was clearly referring to the *second* step because the reason her left foot never landed on the second tread surface was that it landed too far out and only grazed that step as she began to fall. If this is true, then Phillips' testimony would be consistent with Mackay's opinion that the combination of the higher riser and shorter tread caused her to miss the second tread surface, only to graze it before falling.

Given that the question whether Phillips fell while stepping onto the first tread surface or the second is a material fact in substantial dispute, I cannot exclude Mackay's expert report insofar as it refers to the heights of the risers and extensions of the tread surfaces and her opinion that, in the circumstances presented here, the variation caused the plaintiff's fall. Because a reasonable jury could find that Phillips fell due to the defective construction of the stairs, summary judgment in favor of Water Bay is not appropriate. Accordingly, Water Bay's

motion will be denied.

An appropriate order follows.

ENTERED this 8th day of April, 2002.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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APPEARANCES:

Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
For the plaintiff,

James M. Derr, Esq.
St. Thomas, U.S.V.I.
For the defendant.

ORDER

For the reasons stated in the accompanying Memorandum of even date, it is hereby

ORDERED that the defendant's motion to strike the expert report of Rosie Mackay is **GRANTED IN PART AND DENIED IN PART.** Those portions of the opinion and report that do not relate to facts and opinion regarding riser height and tread variations are **EXCLUDED.** The Court reserves ruling on the admissibility of any reference to Uniform Building Code § 3306(c). It is further

ORDERED that the defendant's motion for summary judgment is **DENIED.**

ENTERED this 8th day of April, 2002.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

Copies to:

Honorable Geoffrey W. Barnard
Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
James M. Derr, Esq.
St. Thomas, U.S.V.I.
Mrs. Jackson
Jennifer N. Coffin, Esq.